

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

ROGER J RENVILLE,

Debtor.

Case No. **04-61899-7**

ROGER J RENVILLE,

Plaintiff.

-VS-

**MONTANA GUARANTEED STUDENT
LOANS, US DEPARTMENT OF
EDUCATION, YALE UNIVERSITY, and
EDUCATIONAL CREDIT
MANAGEMENT CORPORATION,**

Defendants.

Adv No. **04-00101**

MEMORANDUM of DECISION

At Butte in said District this 5th day of January, 2006.

The Debtor/Plaintiff, Roger J. Renville (“Roger”), filed a Complaint on September 20, 2004, seeking a discharge of his student loans under 11 U.S.C. § 523(a)(8). Educational Credit Management Corporation (“ECMC”), as assignee and successor in interest to the Montana Guaranteed Student Loan Program and assignee of fifteen of Roger’s student loans filed an

Answer to Roger's Complaint on October 6, 2004. Yale University filed an Answer to Roger's Complaint on October 12, 2004, and Roger and Yale University agreed during the trial that Yale University is owed \$11,100.99 plus an additional \$1,883.50 in attorney's fees and costs. Due to a service error by Roger, the United States, Department of Education ("DOE") was not served with a Summons and a copy of Roger's Complaint until sometime after November 9, 2004. The DOE filed an Answer to Roger's Complaint on December 10, 2004.

Following a scheduling conference held October 27, 2004, trial in this matter was originally scheduled to commence on March 29, 2005. However, ECMC filed an "Unopposed Motion to Modify Scheduling Order and to Continue Trial Date" on February 11, 2005. ECMC's Motion was granted and pursuant to an Order entered February 14, 2005, the trial in this matter was continued to June 21, 2005. Subsequently, on April 14, 2005, the Court entered an Order staying the modified scheduling order, and the deadlines set forth therein, for a period of 30 days to allow the parties an opportunity to conclude settlement negotiations. Settlement negotiations were not successful and consequently, the Court entered yet another Order on June 1, 2005, resetting the matter for trial on October 25, 2005.

Prior to trial, ECMC filed a Motion in Limine and following a hearing on October 20, 2005, the Court entered an Order granting ECMC's Motion in Limine, prohibiting testimony from undisclosed witnesses, whether fact witness or expert witness (including any and all treating physicians and physical therapists or other medical professionals) and introduction of documents not produced in discovery; and prohibiting Roger, or any other lay person, from giving or eliciting from any lay witness any medical, psychiatric, or psychological testimony regarding Roger's diagnosis, prognosis, or significance of Roger's medical, psychiatric, or

psychological conditions, or arguing, stating, speculating or suggesting that any such condition affects Roger's ability to work or impairs or diminishes his employability.

Pursuant to the Court's Pretrial Scheduling Order, the parties filed a proposed pretrial order on October 21, 2005, which the Court approved that same date. The following are the Agreed Facts set forth in the parties' Pretrial Order:

1. [Roger] obtained a Bachelor of Arts degree from the University of Montana-Missoula in 1992 with a degree in journalism, history, and political science. [Roger] later attended Yale University, where he pursued a doctoral degree in history, but withdrew in the Spring of 1995 without obtaining said degree. However, [Roger] eventually received a Master's degree in history from Yale.

2. [Roger] is currently forty-three {43} years old.

3. [Roger] applied for and received 15 student loans from Defendant ECMC's predecessors in interest, to pursue secondary education and advanced degrees. [Roger] obtained additional loans from Yale University and the U.S. Department of Education.

4. [Roger] utilized the student loan proceeds for support and payment of tuition and educational expenses.

5. One or more student loan creditors garnished [Roger's] wages prior to his filing bankruptcy.

6. The U.S. Department of Education has a student loan consolidation program known as the William D. Ford Federal Direct Loan Program (Ford program), codified at 34 CFR § 685.100, et. seq. Detailed information, as well as application forms, for the Ford program may be found at the U.S. Department of Education's web site, www.ed.gov/directloan or

Agreed witnesses for trial were: Roger; his spouse, Julie L. Renville (“Julie”); Bennett G. Braun, M.D.(“Dr. Braun”); and Patricia Schendel, a vocational counselor (“Ms. Schendel”). Sarah Johnston, an associate attorney for ECMC, was identified as a witness by ECMC on October 18, 2005, and thus testified at the trial with respect to the fifteen loans held by ECMC. Sarah Johnston also testified extensively about the William D. Ford Direct Loan Consolidation Program (“William D. Ford Program”). After due notice, trial in this matter was held on October 25 and 26, 2005. Roger was represented at trial by attorney Stephen McCue, ECMC was represented by attorney Steven Johnston and Yale University was represented by attorney Alan Bryan. No appearance was made at the trial by or on behalf of the DOE.¹ Yale University’s Exhibits 1 and 2 were stipulated into evidence, as were ECMC’s Exhibits A through N and Q. Roger’s Exhibits 2, 7² and the transcript portion of Exhibit 3 were admitted into evidence without objection while Exhibits 1, 3, 4, 5, 6, 8 and 9 were admitted into evidence despite objection.

At the conclusion of the trial, the Court reflected upon the evidence presented as it related to the DOE, which made no appearance at the trial, and concluded that Roger had established a right to the relief requested with respect to the obligation owing to the DOE. In particular, the Court’s decision as to the DOE was reached after examining Roger’s income and expenses, the additional circumstances pertinent to this case and Roger’s past efforts to repay his obligation to the DOE as reflected in the certificate of indebtedness. The Court took Roger’s request to

¹ Assistant U.S. Attorney Victoria L. Francis filed a “Statement of Appearance” on October 26, 2006, indicating that the interests of the DOE were aligned with ECMC and Yale University.

² Roger’s Exhibit 7 was not electronically filed but is a duplicate of ECMC’s Exhibit Q.

discharge his student loans to ECMC and Yale University under advisement. This Memorandum of Decision sets forth the Court's findings of fact and conclusions of law.

BACKGROUND

Roger was raised in Miles City and Fort Belknap, Montana. Roger has or had two siblings and is an enrolled member of the Sisseton-Waheton Sioux Indian Tribe of Lake Tavers, South Dakota. Roger did not indicate the whereabouts of his biological father but testified that his stepfather entered his life when Roger was 3 years old. Roger's stepfather was extremely abusive and eventually coerced Roger's mother into participating in the abuse of Roger and his brother.

When Roger was 14 or 15 years old, Roger's mother tried to coerce Roger and his brother into killing their stepfather. Roger's mother later attempted to shoot Roger's stepfather in the presence of Roger and his brother. Roger's mother succeeded in wounding Roger's stepfather, but the stepfather survived. Roger's mother and stepfather proceeded to have a child together after the shooting incident.

Roger left home at the age of 16 and dropped out of high school. Roger obtained a Certificate of High School Equivalency in November of 1979. After leaving home, Roger became a delinquent and was in and out of jail. At some point after leaving home, Roger found himself in Wyoming facing a 7 year prison term. Roger absconded from the law, and eventually fell in with a fundamentalist religious community. Roger testified that he traveled with the religious group for 2 years, living a clean life and studying the bible.

Roger eventually realized that he needed to face the charges he was running from in Wyoming. Upon contacting the authorities in Wyoming, Roger learned that the charges against

him had been dropped and his record had been expunged. As Roger explained, the County Attorney in Wyoming had set Roger free.

Roger then moved to California, where he reverted to his prior life of drugs and alcohol. Roger found himself in a constant state of depression because, even though Roger was out of the “house” and away from his stepfather, nothing was getting better in his life. Roger thus proceeded to consume enough alcohol to gather the courage to shoot himself. Roger followed through with his plan. Roger, however, survived his attempt at suicide, but suffered the permanent loss of an eye. Roger’s brother committed suicide in 1989, presumably, in part, because of the horrific abuse suffered at the hands of his stepfather and because of the burden of a large debt owed to the Internal Revenue Service. Roger still has scars from his knees to the small of his back as a result of his stepfather’s abuse.

Roger eventually returned to Montana and in 1988, when Roger was 28, he enrolled in the University of Montana, Missoula. Roger secured degrees in History, Political Science and Journalism while attending the University of Montana. According to Roger, he loved school and learned that he had a knack for reading, comprehending and regurgitating. Roger thus excelled at the University of Montana but admitted that each year became increasingly difficult. Given his extraordinary achievement at the University of Montana, Roger, during his junior year, began exploring the idea of attending graduate school. Roger sat for the graduate entrance exams, scoring in the 98th percentile. Roger applied to 10 schools across North America, and was denied acceptance by only Harvard.

Notwithstanding his outstanding academic achievement at the University of Montana, Roger explained that he felt as though he were dying and that he just could not live. In

particular, Roger was experiencing nightmares, excessive anger and intrusive thoughts.

Therefore, Roger sought counseling through the student health service during his senior year.

Under the student health insurance program at the University of Montana, Roger was entitled to four (4) or five (5) counseling sessions per year.

Either immediately prior to entering the University of Montana or during his tenure at the University of Montana, Roger married Julie. Upon graduating from the University of Montana, Roger and Julie left for Yale University with the hopes that Roger would receive a doctorate in American Religious History. Roger's goal at that time was to earn a doctorate degree and teach at the college level and/or write.

Once Roger started his studies at Yale University, he quickly learned that graduate studies were vastly different from undergraduate studies. Roger took three (3) or four (4) classes his first semester at Yale University and was not able to complete the papers that were due by the end of the semester. Roger found it virtually impossible to organize and complete complex tasks when under pressure. Roger obtained extensions to complete the classes, but his final grades were dismal. Roger became increasingly frustrated and depressed. Julie was also alarmed by Roger's behavior; Julie was frightened by Roger's anger, bewildered by his lack of academic advancement and was afraid for Roger's well-being.

Roger went to the health service at Yale University and explained that he could not sleep and would wake up tired. Roger also advised the health service that he was extremely irritable and could not organize his thoughts or his life. Roger was provided with thirteen (13) counseling sessions per year at Yale University, but could not afford to pay for any additional counseling beyond the thirteen (13) provided sessions. While the counseling sessions helped, they were not

enough to get Roger through school.

Roger stayed at Yale University for just under 3 years, supporting himself and his family with student loans. Yale University discouraged graduate students from working outside the campus. Roger realized during his second year at Yale University, during a meeting with the Dean, that his student loans were so enormous that he would not be able to repay the loans unless he got on a career teaching path. Roger thus forged ahead to his third year. Roger described his third and final year at Yale University as a nightmare. During their third year at Yale University, Julie found her situation with Roger unbearable and she returned to Montana around Thanksgiving of 1994 with Julie's and Roger's newborn son.

Roger remained at Yale University for a few months after Julie returned to Montana. Roger testified that a church pastor helped Roger a lot during those difficult months. Roger also explained that every time he thought of suicide, he would count to ten and wait for the next day. Roger knew he was having problems, but could not identify the source of his problems and just could not find a fix for his dilemma. Through efforts of his own, Roger learned just prior to leaving Yale University that many of his problems were associated with the abuse he suffered at the hands of his stepfather and a posttraumatic stress disorder.

Roger left Yale University without a graduate degree. After searching for a job, Roger was able to secure a teaching position at St. Labre Catholic Indian school under a 3-year temporary teaching certificate in 1995. Roger's starting salary as a teacher was \$18,700, which salary increased to \$19,400 during the 1996/97 school year, and increased to \$20,100 during the 1997/98 school year. Roger had to relinquish his teaching position at St. Labre, however, when his 3-year temporary certification expired and when he was not able to complete the graduate

classes necessary to obtain a permanent teaching certificate. Given his inability to complete the academic requirements for a teaching certificate, Roger is no longer pursuing his dream of being a teacher. Nevertheless, Roger continues to look for new employment that will provide him better pay or a better opportunity for advancement.

Some time after leaving Yale University, Roger contacted Yale University and requested that he be awarded a Masters degree for his efforts. Roger was advised by Yale University that they did not award Master Degrees but Roger persisted. Roger scrimped and saved in order to undergo an extensive psychiatric evaluation. Per the evaluation, Roger was diagnosed as suffering from posttraumatic stress disorder that is exacerbated by an Adult Attention Deficit/Hyperactivity Disorder. Roger's fragile emotional state is greatly compromised by stress. Roger forwarded the psychiatric evaluation to Yale University and was eventually awarded a Masters degree.

In addition to suffering from posttraumatic stress disorder and Adult Attention Deficit/Hyperactivity Disorder, Dr. Braun has also diagnosed Roger as suffering from Major Depressive Disorder Recurrent Moderate and Polysubstance Abuse in Remission. Dr. Braun testified that Roger will always have some leftover symptoms as a result of the trauma from his childhood abuse, but he could also experience significant improvement with a combination of therapy and medication. Roger has been taking medications for his disorders for some time. For instance, in 1999, Roger was taking Zoloft and Ritalin. Roger is presently taking Wellbutrin (300 mg daily) and Concerta (54 mg daily). Dr. Braun also emphasized that exercise and self-learning were critical to Roger's well-being

Dr. Braun stated that he would not characterize Roger as a "high functioning individual"

but went on to explain that Roger is functioning within the confines of his disability. Dr. Braun explained that Roger is not very organized and is basically unable to stay on a single task.

Dr. Braun characterized Roger as a sprinter, who can sustain short bursts of effort. Roger, however, is not a marathon runner. Even though Roger has contemplated divorcing Julie to relieve her of his enormous student loan debt, Dr. Braun noted that it would be catastrophic to Roger's health if Roger's marriage dissolved. According to Dr. Braun, Roger's marriage to Julie is the glue that holds Roger's life together.

Julie reiterated the sentiments of Dr. Braun when she testified that she feels as though she is the glue that holds Roger together. In discussing the foregoing issue in conjunction with Roger's anger and bursts of rage, Julie gave the following compelling and emotional testimony:

One of the big issues in our marriage has been Roger's anger, you know, Roger's anger over nothing. I can be saying the simplest thing and um I get anger from him, you know, for no apparent reason at all. You know, I used to think it was me. Not the right kind of wife, not doing this right or not doing that right. I know now that its not me, its him. It is a difficult thing to live with a man like him. You know, ah, I love him dearly, he is a smart man but he is {pause} broken, that is the best way I can describe him. You know, I have to handle him with kit gloves. I often times feel that I am the glue that keeps him together and I don't feel so strong myself sometimes. I sometimes don't feel like being the glue, but that is what I am. Um, he is quick to anger and his depression runs deep...it is often and re-occurring.

And I can only tell you what it is like as a wife to have your husband tell you he wants to kill himself. And only as recently as a few months ago to have your husband sit on the couch and not be the strong man that you see here today, you know that is not what he is all the time, although he can do that, but to have your husband who you love and adore tell you that what a failure he feels. How he has failed you, how he has failed your family and how he has failed himself and that he wants to . . . eliminate himself basically. So you go to work and you pretend that everything is okay and you hope when you go home that he is alive and he hasn't shot himself and for God's sake if he has shot himself, that he hasn't done it at a time when your son will come home.

Does he need treatment? Desperately. He desperately needs treatment. I think that sometimes he refuses to recognize it himself. I think he likes to intellectualize things away. I think he wishes it wasn't so, but the fact is it is so and a woman should not have to live and worry the way that I worry about him. I don't know what else to say.

In addition to working as a teacher at St. Labre Indian School, Roger worked as an assistant manager at the 4-B's restaurant in Miles City, Montana from September of 1998 to February of 2001, earning \$1,400.00 per month. Roger then worked as a correctional officer at the Pine Hills Youth Correctional Facility from February 2001 to April 2003, at a wage of \$12.05 per hour.

Roger and Julie left Miles City in 2003 when Julie secured a full-time position with the Department of Veterans Affairs. Julie currently earns \$16.91 per hour. Roger worked for a short time as a correctional officer at the Montana State Prison earning \$12.05 per hour, but has been employed by the Lewis & Clark County Sheriff's Office in Helena since October of 2003 and earns \$12.41 per hour. This past December of 2005, Roger's pay was scheduled to increase to \$13.33 per hour. In 2003, Roger's and Julie's combined adjusted gross income totaled \$60,285.58. In 2004, Roger's and Julie's combined adjusted gross income totaled \$68,617. After taxes, Roger estimated that his and Julie's combined monthly take home pay will be roughly \$3,667 after January 1, 2006.

According to Roger, he has continually requested overtime from his employers in order to keep his head above water. For instance, in 2002, Roger worked a total of 741 overtime hours. Likewise, in 2004 Roger requested all the overtime he could get at his job to help pay for medical and legal bills. Roger stated that occasions occurred in 2004 when he would work 39 hours of overtime in a 2-week period. However, Roger was suspended twice in 2004 when his temper

overwhelmed him and Roger's supervisor instructed Roger to limit his overtime to 16 hours per pay period. Roger's physical handicap, i.e., loss of one eye, impacts his opportunity to advance as a law enforcement officer.

Roger discussed the monthly living expenses for his family, which expenses total roughly \$3,267.00 per month. The monthly expense figure of \$3,267.00 does not include any counseling for Roger, which Dr. Braun testified is critical to Roger's future well-being. Minimum monthly counseling will cost Roger approximately \$250.00 per month. Roger's monthly expense figure of \$3,267.00 also does not provide any cushion for emergencies. For example, Roger testified that Julie and he own three vehicles; a 1992 Dodge Ram, 1990 Isuzu Trooper and a 1986 Ford Tempo. Roger characterized the 1992 Dodge Ram as a dependable little vehicle. The 1990 Isuzu Trooper has 180,000 miles and the 1986 Ford Tempo has not worked in years. As a result of the condition of the 1990 Isuzu Trooper and the 1986 Ford Tempo, Roger anticipates that Julie and he will have a major auto expense in the next year or two.

Roger currently owes \$103,715.80, plus interest, to ECMC (attributable to 9 loans for Roger's undergraduate studies and 6 loans for graduate studies at Yale University), \$19,000 to the DOE and \$12,984.49 to Yale University for his student loans. The loans with ECMC and the DOE are eligible for consolidation under the William D. Ford Program. The Yale University loans appear to be private loans that are not eligible for consolidation under the William D. Ford Program.

The above entities have garnished Roger's wages over the years and Roger was forced to seek protection under the Bankruptcy Code in 2004 after receiving notification from the State of Montana, Department of Justice, Motor Vehicle Division, that his driving privileges would be

suspended for his failure to enter into a repayment agreement with the Montana Guaranteed Student Loan Program.

Sarah Johnston (“Sarah”) of ECMC testified that Roger’s loans have been in default since September of 1996. Sarah also testified that Roger owed ECMC \$121,803.01 as of October 10, 2005. The foregoing amount consists of \$65,704.17 in principal, \$32,058.86 in interest and \$24,039.98 in collection costs. Notwithstanding the foregoing balance, Sarah stated that ECMC would agree to accept the sum of \$103,715.80, which amount continues to accrue interest at a rate of \$11.20 per day. Sarah examined the four payment options offered under the William D. Ford Program and determined that Roger’s monthly payments under the various options would be as follows:

Standard Repayment: \$1,164.52 per month (for 10 years).

Extended Repayment: \$638.60 per month (for 30 years).

Graduated Repayment: The initial payment would start at \$582.26 per month and would not exceed \$1,746.78 at the end of 30 years.

Income Contingent Repayment: This option is based on a borrower’s adjusted gross income, family size and poverty level. Based upon Roger’s adjusted income from 2003, Roger’s monthly payment would be \$736.59.

A fifth repayment alternative allows a borrower to contact the Department of Education whereby the borrower presents their unique circumstances that preclude them from using one of the four options generally used under the William D. Ford Program. Sarah acknowledged that the above monthly payments do not factor in either the loans to Yale University or the loans to the DOE.

Finally, ECMC called Ms. Schendel who testified that based upon Roger’s skill level,

level of education and given the current job economy in Montana, Roger should be able to secure a semi-skilled or skilled job. The median wage offered by Ms. Schendel for the jobs matching Roger's qualifications was roughly equal to the wage Roger is currently earning at the Lewis and Clark Sheriff's Office. Accordingly, the testimony of Ms. Schendel merely confirmed that Roger is achieving his current earning potential.

DISCUSSION

The discharge of student loan obligations is governed by 11 U.S.C. § 523(a)(8), which provides in relevant part:

(a) A discharge under section 727, 1141, 1228(a) 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –

(8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]

The Bankruptcy Code does not define “undue hardship.” Courts have held, however, that Congress intended the term to be interpreted strictly, and on a case-by-case basis. *Albert v. Ohio Student Loan Comm’n (In re Albert)*, 25 B.R. 98 (Bankr. N.D. Ohio 1982); *United States v. Brown (In re Brown)*, 18 B.R. 219 (Bankr. D. Kan. 1982); *Garmerian v. Rhode Island Higher Educ. Assistance Auth. (In re Garmerian)*, 81 B.R. 4 (Bankr. R.I. 1987). As the court in *Brown* noted:

It seems universally accepted, however, that “undue hardship” contemplates unique and extraordinary circumstances. Mere financial adversity is insufficient, for that is the basis of all petitions in bankruptcy.

Brown, 18 B.R. at 222. On the other hand, the Bankruptcy Code does not require that the debtor “live in abject poverty . . . before a student loan may be discharged.” *In re Mallinckrodt*, 260 B.R. 892, 900 (Bankr. S.D. Fla. 2001) (quoting *In re Faish*, 72 F.3d 298, 305 (3rd Cir. 1995)).

In addition:

[A] loan . . . that enables a person to earn substantially greater income over his working life should not as a matter of policy be dischargeable before he has demonstrated that for any reason he is unable to maintain himself and his dependents and to repay the educational debt.

Report of the Comm’n of the Bankruptcy Laws of the United States, House Doc. No. 93-137, Part I, 93rd Cong., 1st Sess. (1973) at 140, n. 14 and 15, reprinted in COLLIER ON BANKRUPTCY, Appendix 2 at PI-i.

In a complaint to determine the dischargeability of student loan debt, a debtor has the burden of proof to show evidence of undue hardship sufficient to discharge the debt. *In re Rifino*, 245 F.3d 1083, 1087-88 (9th Cir. 2001); *In re Pederson*, 18 Mont. B.R. 429, 434 (Bankr. D. Mont. 2000), *In re Thomsen*, 17 Mont. 493, 499, 234 B.R. 506, 510 (Bankr. D. Mont. 1999); *Healey v. Massachusetts Higher Educ. (In re Healey)*, 161 B.R. 389, 393 (E.D.Mich. 1993); *Connecticut Student Loan Found. v. Keenan (In re Keenan)*, 53 B.R. 913 (Bankr. D. Conn. 1985).

Courts have identified several factors and tests to consider when determining whether “undue hardship” exists in a particular case. *See Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 554 (8th Cir. 2003) (identifies the divergent body of authority, and then discusses the *Brunner* and the “totality of circumstances” tests). The United States Court of Appeals for the Second Circuit established the *Brunner* test for determining “undue hardship” in the

educational loan context. *Brunner v. New York State Higher Educ. Services Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987). According to the Second Circuit in *Brunner*, in order to receive a discharge under 11 U.S.C. § 523(a)(8)(B), a debtor must show:

(1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Id. The Ninth Circuit Court of Appeals adopted the *Brunner* test as the appropriate test for determining what constitutes undue hardship under 11 U.S.C. § 523(a)(8)(B). *United Student Aid Funds v. Pena (In re Pena)*, 155 F.3d 1108, 1114 (9th Cir. 1998) (“We adopt the *Brunner* test as the test to be applied to determine the ‘undue hardship’ required to discharge student loans in bankruptcy pursuant to 11 U.S.C. § 523(a)(8)(B)”); *Rifino*, 245 F.3d 1083, 1087 (9th Cir. 2001).

In *Pena*, the Court summarized the *Brunner* test as thus,

First, the debtor must establish "that she cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans." *Brunner*, 831 F.2d at 396. The court noted that this portion of the test "comports with common sense" and had already "been applied frequently as the minimum necessary to establish 'undue hardship.'" *Id.* (citing *In re Bryant*, 72 B.R. 913, 915 (Bankr.E.D.Pa.1987)).

Second, the debtor must show "that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans." *Brunner*, 831 F.2d at 396. This second prong is intended to effect "the clear congressional intent exhibited in section 523(a)(8) to make the discharge of student loans more difficult than that of other nonexcepted debt." *Id.*

The third prong requires "that the debtor has made good faith efforts to repay the loans" *Brunner*, 831 F.2d at 396. The "good-faith" requirement fulfills the purpose behind the adoption of section 523(a)(8). *Brunner*, 46 B.R. at 754-55. Section 523(a)(8) was a response to "a 'rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of education loan debts.'"

" *Id.*, (quoting the Report of the Commission on the Bankruptcy Laws of the United States, House Doc. No. 93-137, Pt. I, 93d Cong., 1st Sess. (1973) at 140 n. 14). This section was intended to "forestall students . . . from abusing the bankruptcy system." *Id.*

Pena, 155 F.3d at 1111; *Rifino*, 245 F.3d at 1088-89.

This Court, in *House v. Montana Deferred Student Loan Corp. (In re House)*, 17 Mont. B.R. 321 (Bankr. D. Mont. 1999), followed the directive of the *Pena* Court by utilizing the three-prong *Brunner* test, which test is also applicable in the instant case. *See also Gettle v. Sallie Mae Servicing Corp. (In re Gettle)*, 19 Mont. B.R. 59, 257 B.R. 583 (Bankr. D. Mont. 2000); *Marsh v. Moorehead College (In re Marsh)*, 19 Mont. B.R. 39, 257 B.R. 569 (Bankr. D. Mont. 2000); *Hatfield v. William D. Ford Federal Direct Consolidation Program (In re Hatfield)*, 19 Mont. B.R. 47, 257 B.R. 575 (Bankr. D. Mont. 2000); and *Hiltz v. U.S. Dept. of Education (In re Hiltz)*, ___ Mont. B.R. ___ (Bankr. D. Mont. 2003). A debtor must prove all three elements identified in *Brunner* before discharge can be granted on grounds of undue hardship. *Rifino*, 245 F.3d at 1087-88; *Hiltz*, ___ Mont. B.R. at ___ .

I. First Prong.

As set forth above, the *Brunner* test starts with an examination of whether the debtor can maintain a minimal standard of living and still repay his student loan obligations. *Rifino*, 245 F.3d at 1088. To satisfy the first prong, a debtor must demonstrate more than simply tight finances. *Rifino*, 245 F.3d at 1088; *In re Nascimento*, 241 B.R. 440, 445 (9th Cir. BAP 1999). In defining undue hardship, courts require more than temporary financial adversity, but typically stop short of utter hopelessness." *Id.*; *see In re Faish*, 72 F.3d at 305 ("[T]he Bankruptcy Code does not require that the debtor "live in abject poverty . . . before a student loan may be

discharged.”).

The Court concludes, based upon the following reasoning, that Roger has satisfied the first *Brunner* prong. Roger demonstrated that his expenses consume a large part of his income. Nevertheless, Roger conceded that he and Julie do have monthly disposable income and Roger expressed a willingness to contribute his disposable income to his student loans. However, the monthly payment that Roger can afford to contribute to his student loans pales in comparison to the amount that Roger would need to pay on a monthly basis in order to repay the loans over a reasonable period of time. In addition, the Court has serious concerns about the impact that the student loans have on Roger’s mental health and in turn, his continuing ability to hold down a job. In a factually similar case, Judge Gibson in *Reynolds v. Pennsylvania Higher Education (In re Reynolds)*, 425 F.3d 526, 532-33 (8th Cir. 2005) (a “totality of circumstances” case)³, provided the following insightful and instructive comment:

[I]llness often affects both a debtor's ability to earn and her expenses; in such cases, factors affecting the debtor's health also have a financial significance. Where the evidence shows that financial obligations are likely to undermine a debtor's health, which in turn will affect the debtor's financial outlook, we think it entirely consistent with *Andrews* and *Long* to take such facts and circumstances into account. We will not adopt an interpretation of "undue hardship" that causes the courts to shut their eyes to factors that may lead to disaster, both personal and financial, for a suffering debtor.

In the case *sub judice*, Roger desperately needs mental health treatment, which treatment he is not presently receiving. According to Roger’s testimony, which was not disputed by ECMC or Yale University, minimal counseling will cost \$250.00 per month. That amount takes a large

³ The Eighth Circuit follows the less restrictive “totality of circumstances” approach to the undue hardship inquiry and does not follow the *Brunner* test. See *Long v. Educational Credit Mgmt. Corp.*, 322 F.3d 549, 554 (8th Cir. 2003).

portion of Roger's disposable monthly income of \$400.00. Once again, the Court is persuaded by the writings of Judge Gibson:

Although Reynolds may be performing adequately at her current job and may therefore have some disposable income available to dedicate to the debts, the bankruptcy court found that she was at risk for recurrence of symptoms that would cause "voluntary or involuntary termination" of that employment. [*Reynolds v. Pa. Higher Educ. Assistance Agency*, 303 B.R. 823] at 832 [Bankr. D.Minn. 2004]. The court found "the mere existence of this debt burden clearly is a significant block to the Debtor's recovery from mental illness." *Id.* at 837. Conversely, eliminating the debt would mitigate her symptoms and reduce the possibility of recurring depression and decompensation. *Id.* at 840.

In re Reynolds, 425 F.3d at 533. Roger has been working a tremendous amount of overtime to pay his medical and legal bills. The excess overtime has not allowed Roger to save any money. Moreover, as a result of the excess stress added by the overtime he has previously worked, Roger has been suspended from work on two occasions because he was unable to control his temper. As a result of the two suspensions, Roger's supervisor has restricted the amount of overtime that Roger may work to 16 hours per pay period. The fact that Roger and Julie have both been working overtime to meet their daily needs convinces the Court that Roger and Julie do not have sufficient disposable income to make even a minimal payment on Roger's student loans.

The first prong of the *Brunner* test requires that the debtors show they cannot repay their student loans and maintain a minimal standard of living. *Pena*, 155 F.3d at 1111. This prong "comports with common sense". *Id.*; *Brunner*, 831 F.2d at 396; *In re Pederson*, 18 Mont. B.R. at 438. Applying this common sense standard to the evidence, the Court concludes that Roger cannot maintain a minimal standard of living and still make payments on his student loan obligations. Under different circumstances, this Court has examined whether a debtor can afford to make payments under the William D. Ford Program touted by ECMC. However, as Sarah

Johnston testified, the minimum payment due just on the ECMC notes under the four payment alternatives offered under the William D. Ford Program would be \$582.26. Roger simply cannot afford that payment and thus, the William D. Ford Program does not, in this case, provide ECMC or the DOE with a defense to Roger's request for discharge of his student loans.

The Court is needled by the suggestion of ECMC's counsel that Roger could save money every month if he would drive to Lake Tavers, South Dakota to obtain his medications through the Indian health service. Not only would Roger have to pay the gas to travel roughly 800 miles one-way, but he would undoubtedly have the expense of motels and meals and would also have to take time off from work. The Court was equally unimpressed by counsel's suggestion that Roger could simply use his vacation time to make the suggested monthly journeys. Counsel for ECMC obviously saw the absurdity of his argument as he later suggested that perhaps it would be financially wise if Roger visited the Indian health service on an annual basis rather than a monthly basis.

The Court was equally bothered by the apparent attack by ECMC's counsel on Roger for his past use of well-known drugs to combat the side effects of the mental health medications. Roger's past use of well-known prescription drugs has no bearing whatsoever on the decision before the Court today.

II. Second Prong.

To satisfy the second prong of the *Brunner* test, debtors must prove that their state of affairs is likely to persist. The Ninth Circuit Court of Appeals explains that the second prong "is intended to effect 'the clear congressional intent exhibited in section 523(a)(8) to make the discharge of student loans more difficult than that of other nonexcepted debt.'" *Rifino*, 245 F.3d

at 1088-89. Courts which have examined the second prong of the *Brunner* test focus on whether a debtor's present financial condition is temporary, or whether the condition will exist for a significant period of time. *In re Pena*, 155 F.3d at 1113 (Granting a discharge of the debtors' student loans where one of the debtor's was declared permanently mentally disabled and incapable of holding a job for more than six months to a year.); *Matter of Roberson*, 999 F.2d 1132, 1137 (7th Cir. 1993) (Discharge of student loans was denied where the debtor's current impediments to employment, including lack of transportation and wrist and back injuries, would not preclude gainful employment in the future.); *In re Brunner*, 46 B.R. 757 (The debtor, who claimed to suffer from anxiety and depression, was denied a discharge of her student loans where the evidence was "too thin to support a finding that her chances of finding any work at all [were] slim"). The following analysis in *Nys v. Educational Credit Mgmt. Corp. (In re Nys)*, 308 B.R. 436, 446-47 (9th Cir. BAP 2004), applies in this case:

In sum, we conclude that "additional circumstances" under the second prong of the *Brunner* test must be indicia of a debtor's inability to repay the loan in the future. Such circumstances need not be "exceptional," except in the sense that they are tenacious and demonstrate insurmountable barriers to the debtor's financial recovery and ability to pay for a significant portion of the repayment period. This approach gives the courts the appropriate flexibility to do justice in each unique case.

Based on the prior case law and this case, "additional circumstances" may include the following nonexhaustive list of factors:

1. Serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement; *Brunner*, 831 F.2d at 396;
2. The debtor's obligations to care for dependents; *Id.*;
3. Lack of, or severely limited education; *Pena*, 155 F.3d at 1114;

4. Poor quality of education; [note omitted]
5. Lack of usable or marketable job skills; *Birrane*, 287 B.R. at 497;
6. Underemployment; [note omitted]
7. Maximized income potential in the chosen educational field, and no other more lucrative job skills;
8. Limited number of years remaining in work life to allow payment of the loan; *Brunner*, 831 F.2d at 396;
9. Age or other factors that prevent retraining or relocation as a means for payment of the loan;
10. Lack of assets, whether or not exempt, which could be used to pay the loan;
11. Potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income;
12. Lack of better financial options elsewhere.

As discussed below, Roger satisfies a number of the above factors. First, Roger and Julie have accumulated virtually no assets. Given their current station in life, it is doubtful that Roger and Julie will have the wherewithal to repay the student loan obligations during their lifetime. Additionally, the on-going drug expense recommended by Dr. Braun to improve Roger's mental state will, as provided by Dr. Braun's in his testimony, most probably last throughout Roger's lifetime. Roger testified that his physically handicap, i.e., loss of an eye, impedes his opportunity to advance as a law enforcement officer.

Furthermore, according to Dr. Braun, Roger suffers from Major Depressive Disorder Recurrent Moderate and Polysubstance Abuse in Remission. While Roger's Polysubstance

Abuse is currently in remission, it is not cured. More importantly, however, is the overwhelming evidence which shows that Roger's depression is recurrent and not under control. In Julie's own emotional words, Roger is "broken" and "he is quick to anger and his depression runs deep...it is often and re-occurring." The Court once again harkens back to *Reynolds*: "A condition that is recurrent by its very terms is one that will occur again. See *Dorland's Illustrated Medical Dictionary* 1434 (28th ed. 1994) (recurrent means 'returning after remissions'). A remission is an abatement of the symptoms of a disease." *In re Reynolds*, 425 F.3d at 533.

The evidence in this case is compelling. The Court is hopeful that Roger can find help through counseling, and that he will continue to cope with his anger and depression with the help of medication, the employee assistance program offered through his employment, exercise, family time, cognitive restructuring and preventative mental health maintenance, but the fact of the matter is that Roger suffers from a recurrent disease that he will undoubtedly live with the remainder of his life. As explained by Dr. Braun, Roger will always have some leftover trauma. The Court can only conclude that the additional circumstances impacting Roger's current state of affairs are likely to persist for a significant portion of the repayment period of his student loans.

III. Third Prong.

The third *Brunner* prong requires that the debtor has made good faith efforts to repay the student loans. *Pena*, 155 F.3d at 1111; *Rifino*, 245 F.3d at 1087. It does not appear that Roger has made any voluntary payments on the loans to Yale University, but the parties do not dispute that Roger has made voluntary payments on the loans now with ECMC. In addition, Yale University and ECMC's predecessor have both received payments on their respective loans through the garnishment of Roger's wages. Additionally, Roger has explored consolidation of

his loans under the William D. Ford Program, but has found, as Sarah Johnston testified, that the payments required under the William D. Ford Program are simply beyond what Roger can afford. In sum, the Court concludes that Roger has made every effort available to him to repay his student loan obligations. Roger has satisfied the third prong of the *Brunner* test.

CONCLUSIONS OF LAW

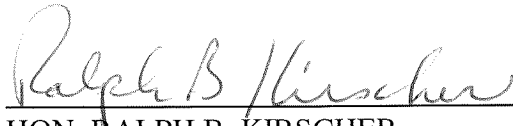
1. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334 and 157.
2. This is a core proceeding to determine the dischargeability of educational loans under 28 U.S.C. § 157(b)(2)(I) and 11 U.S.C. § 523(a)(8).
3. Roger has satisfied his burden of proof under § 523(a)(8) by a preponderance of the evidence. In particular, Roger has shown that he and Julie have made a concerted effort to maximize their earning potential and at the same time, minimize their expenses. Even with such effort, Roger is not able to maintain a minimal standard of living and repay his student loans. In addition, Roger has shown that his current state of affairs is likely to persist into the future and Roger has shown that he has made a good faith effort to repay the student loans. Thus, Roger has shown that excepting his student loans from discharge will impose an undue hardship on Roger and his family.

In accordance with the foregoing, the Court will thus enter a separate Judgment providing as follows:

IT IS ORDERED and ADJUDGED that Judgment is entered in favor of the Plaintiff/Debtor, Roger J. Renville, and against the Defendants, Educational Credit Management Corporation, the United States Department of Education and Yale University; and the Plaintiff's

educational loans due to Defendants are discharged pursuant to 11 U.S.C. § 523(a)(8).

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER

U.S. Bankruptcy Judge

United States Bankruptcy Court

District of Montana